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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

SAMANTHA ALARIO, et al.,

Plaintiffs,

and

TIKTOK INC.,

Consolidated Plaintiff,

v.

AUSTIN KNUDSEN, *in his official
capacity as Attorney General of the
State of Montana,*

Defendant.

CV 23-56-M-DWM

CV 23-61-M-DWM

**PLAINTIFFS' SUBMISSION
REGARDING DISCOVERY**

Pursuant to the Court’s February 5, 2024 Order (Dkt. 126), Plaintiffs Samantha Alario, Heather DiRocco, Carly Ann Goddard, Alice Held, and Dale Stout (“Creator Plaintiffs”) and Consolidated Plaintiff TikTok Inc. (collectively, “Plaintiffs”) respectfully submit this accounting of the individuals and entities from which they seek discovery and why the information sought is necessary and pertinent to this litigation.

As previously submitted, Plaintiffs respectfully maintain that this case raises predominantly legal issues and that further discovery is not necessary. *See* Dkt. 124. Should the Court authorize further discovery, however, Plaintiffs respectfully request an opportunity to take targeted discovery for the limited purpose of avoiding trial by ambush and a one-sided presentation of the facts.

First, Plaintiffs seek discovery from the State for the limited and necessary purpose of understanding the evidence considered in connection with SB 419 and the facts on which the State may rely in this action. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 862 (9th Cir. 2014) (“The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush.”); *Comput. Task Grp., Inc. v. Brotby*, 364 F.3d 1112, 1117 (9th Cir. 2004) (“An important purpose of discovery is to reveal what evidence the opposing party has.”); *N. Pac. Ins. Co. v. Stucky*, 2013 WL 12134040, at *2 (D. Mont. Dec. 17, 2013) (“The purpose of

discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute.”) (internal quotation marks omitted).

For example, the Court has observed that the State may seek to develop evidence regarding its purported consumer-protection justification for enacting SB 419. *See* Dkt. 113 at 22 (“Despite providing no affidavits or additional evidence, the State contends that the Legislature’s purpose in passing SB 419 was merely protection of Montanans against TikTok’s allegedly harmful data practices.”); *id.* at 25 (“The State attempts to persuade that its actual interest in passing this bill is consumer protection. However, it has yet to provide any evidence to support that argument.”).¹ The discovery of any such evidence is necessary and pertinent to this litigation. *See Brotby*, 364 F.3d at 1117.

Plaintiffs accordingly seek discovery on the following topics from the following entities and individuals:

Discovery Topic	Entity/Individual
Individuals and documents identified in the State’s initial disclosures	Montana Department of Justice
Discoverable information from disclosed expert witnesses	Montana Department of Justice

¹ Understanding the evidence on which the State relied in enacting SB 419 is also necessary and pertinent to the Creator Plaintiffs’ due process claim. *See Kashem v. Barr*, 941 F.3d 358, 384 (9th Cir. 2019) (whether affected party received due process depends in part on whether party had opportunity to rebut evidence “on which the official actor relied” in taking adverse action).

Consumer complaints relating to TikTok	Montana Department of Justice; Attorney General Knudsen ²
Documents available to the State received from third parties (i.e., not TikTok Inc. itself) in connection with its or other states' investigations of TikTok	Montana Department of Justice and its outside counsel in its investigation of TikTok, Cooper & Kirk; Attorney General Knudsen ³
Information regarding individuals interviewed or deposed in connection with the State's investigation of TikTok	Montana Department of Justice and its outside counsel in its investigation of TikTok, Cooper & Kirk; Attorney General Knudsen ⁴
Information considered by State officials in relation to specific public statements about TikTok	Montana Department of Justice; Montana Department of Justice Crime Information Bureau Chief Anne Dormady; Montana Department of

² Attorney General Knudsen has stated that the Department of Justice, Office of the Attorney General, received consumer complaints relating to TikTok prior to the State enacting SB 419. *See Montana Vs TikTok: Attorney General Austin Knudsen talks Montana's TikTok Ban & Chinese Spy Balloon*, Krach Institute for Tech Diplomacy at Purdue, at 1:50 (Sept. 28, 2023), *available at* <https://www.youtube.com/watch?v=sVjfobsBYqM> (hereinafter, "Knudsen Krach Institute Interview") ("As we got into the Attorney General's office . . . the office started receiving some complaints about – not just TikTok, for sure – about a number of the social media companies, and so we started looking into them because we were getting enough complaints. . . . But as we investigated, TikTok really became the one that stuck out.").

³ Attorney General Knudsen has testified that the concerns animating SB 419 were informed by the State's investigation of TikTok. *See, e.g.*, Dkt. 13-2, Mar. 28, 2023 Hr'g on SB 419 before the Montana House of Representatives Judiciary Committee, at 5-6 (page numbers refer to ECF pagination) ("TikTok is spying on Americans, period. TikTok is a tool of the Chinese Communist Party. . . . We know this just from all the investigations that have gone on from our own internal investigations. There's a lot of people here behind me that are employees of the Department of Justice who are much more knowledgeable than I am and can provide some detailed information for you.").

⁴ *Id.*

	Justice Information Security Officer Eric Tarr; Attorney General Knudsen ⁵
Information reflecting research, testing, study, or analysis of TikTok	Montana Department of Justice
Information reflecting any less-restrictive alternatives considered by the State in lieu of the complete ban of TikTok as codified in SB 419	Montana Department of Justice
The legislative record for SB 419	Legislative Services Division of the Montana Legislature; Montana Department of Justice

Second, Plaintiffs seek to discover facts establishing that the State’s now-asserted consumer-protection interest is pretextual. *See Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 436-37 (9th Cir. 2008) (considering whether state’s asserted goals were mere pretexts). Permitting discovery on this topic is necessary to avoid a one-sided presentation of the evidence in which the State asserts its purported consumer-protection interest while shielding evidence demonstrating that the State was actually animated by a foreign policy purpose. *See EEOC v. Gen. Tel. Co. of Nw., Inc.*, 885 F.2d 575, 578 (9th Cir. 1989) (“[F]acilitating one-sided presentation of a defense prevents the factfinder from getting ‘the full picture’ of a defendant’s

⁵ *See Appendix A*, Public Statements by Montana Officials Regarding TikTok in Relation to SB 419.

conduct by precluding the plaintiff from enjoying a fair opportunity to challenge the evidence and the defendant's theory in offering it."').⁶

Plaintiffs accordingly seek discovery on the following topics from the following entities and individuals:

Discovery Topic	Entity/Individual
Information regarding the nature of the perceived threat posed by China and TikTok	Montana Department of Justice; Attorney General Knudsen ⁷
Information showing the State intended to punish TikTok through enactment of SB 419	Montana Department of Justice; Attorney General Knudsen ⁸
Information relating to the spy balloon from on or around February 2023	Montana Department of Justice; Attorney General Knudsen ⁹

⁶ Rebutting the State's pretextual consumer protection interest is also necessary and pertinent to TikTok Inc.'s Bill of Attainder claim. *See Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 818 (9th Cir. 2016) (in evaluating Bill of Attainder claim, courts "look for evidence permitting an inference of punitive intent").

⁷ Attorney General Knudsen has stated that the issue underlying the TikTok ban "really is one of national security." *See* Knudsen Krach Institute Interview, *supra* note 2, at 15:06.

⁸ The Legislature rejected an amendment to SB 419 that would have broadened its scope to "all foreign adversaries, not just TikTok." *See* Eric Dietrich, *Gianforte signals he'll sign TikTok ban – but prefers changes first*, MONTANA FREE PRESS (Apr. 27, 2023), available at <https://montanafreepress.org/2023/04/27/montana-governor-gianforte-pushes-back-on-tiktok-ban-bill/>. State Representative Brandon Ler, "who served as [SB 419's] chief proponent on the House floor," spoke out against the amendment, saying it "completely strips the whole intent of the bill." *Id.*

⁹ Attorney General Knudsen has stated that the "biggest reason" for SB 419, and what "crystalized" it for the Legislature, was the purported Chinese spy balloon that flew over Montana in February 2023. *See* Knudsen Krach Institute Interview, *supra* note 2, at 5:12, 7:20.

Communications regarding the Governor's mark-up of SB 419	Montana Department of Justice; Montana Office of the Governor ¹⁰
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For the foregoing reasons, to the extent the Court authorizes further discovery, Plaintiffs respectfully submit that the foregoing proposed topics are necessary and pertinent to a fair adjudication of this dispute.

¹⁰ Eric Dietrich, *supra*, Note 7 (reporting on communications between the Governor's office, Attorney General Knudsen, and a group of Montana legislators regarding proposed amendments to SB 419 that would have stricken the bill's explicit references to "TikTok" and "China").

DATED this 15th day of February, 2024.

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Appendix A – Public Statements by Montana Officials Regarding TikTok in Relation to SB 419

Montana Attorney General Austin Knudsen

- “TikTok is a tool of the Chinese Communist Party. It is owned by a Chinese company, and under China law, if you are based in China, you will cooperate with the Chinese Communist Party, period. If they request that data, they will—they [are] required to turn it over, and that’s what’s happening here. We know this just from all the investigations that have gone on, from our own internal investigations.”¹¹
- “[TikTok] is a business that is controlled by an existential threat, an enemy of the United States, and that’s China’s own words. China considers America its largest enemy by their own military doctrines and publications. They see a war with the United States as inevitable, and they’re using TikTok as an initial salvo in that war.”¹²
- “[TikTok is] scanning the backgrounds of all your other apps on your phone. That was started earlier, but I really want to stress that. I mean, you’re allowing ByteDance and therefore the Chinese Communist Party access to everything on your phone. They’re scanning all of your files. They’re scanning all of your other apps. They’re tracking your background information. They’re tracking your location. They’re going so far as to when you post that funny video on TikTok, they’re scanning the background information in that video and in that photographic evidence for any kind of sensitive useful intelligence. Is there anything in that picture we can use? So, this is pretty astounding stuff.”¹³
- “[China views TikTok] as a weapon of war, as a tool to undermine our country.”¹⁴

¹¹ Dkt. 13-2, Mar. 28, 2023 Hr’g on SB 419 before the Montana House of Representatives Judiciary Committee, at 5-6.

¹² *Id.* at 6.

¹³ *Id.* at 25-26.

¹⁴ *Id.* at 28.

- “TikTok is scanning all of your photographs and your videos for intelligence, military intelligence. . . . So this is a very dangerous application that’s collecting an awful lot of data and transmitting it straight to the Chinese Communist Party via ByteDance.”¹⁵
- “The [TikTok] app is feeding harmful adult content to children that encourages illegal and dangerous behavior.”¹⁶
- “As we got into the Attorney General’s office . . . the office started receiving some complaints about – not just TikTok, for sure – about a number of the social media companies. And so we started looking into them because we were getting enough complaints. . . . But as we investigated, TikTok became the one that stuck out.”¹⁷
- “The fact that this is data being harvested and given to an enemy foreign government, because that’s what we found out. I talked about the investigation, we were horrified about what we found, the amount and type of data that TikTok is harvesting.”¹⁸

Montana Department of Justice Information Security Officer Eric Tarr

- “[T]here’s a lot more on the back end that TikTok is grabbing from the citizens of Montana, and we see the traffic going to China. So, 30 percent of

¹⁵ Kassy Dillon, *Montana Attorney General Stands by TikTok Ban Despite Lawsuits: ‘Spying Tool for the Chinese Communist Party*, FOX NEWS (June 9, 2023), available at <https://www.foxnews.com/media/montana-attorney-general-stands-tiktok-ban-despite-lawsuits-spying-tool-chinese-communist-party>.

¹⁶ *Knudsen Supports Bill to Ban TikTok in Montana*, MILES CITY STAR (Feb. 28, 2023), available at https://www.milescitystar.com/news/local/knudsen-supports-bill-to-ban-tiktok-in-montana/article_108ac24c-b782-11ed-9181-b7e1b4abf22b.html.

¹⁷ See Knudsen Krach Institute Interview, *supra* note 2, at 1:50.

¹⁸ See *id.* at 2:06.

the traffic is always going to China from the IP addresses that TikTok and ByteDance are using.”¹⁹

Montana Department of Justice Crime Information Bureau Chief Anne Dormady

- “[C]hild exploitation is occurring through TikTok”²⁰

¹⁹ Dkt. 13-2, Mar. 28, 2023 Hr’g on SB 419 before the Montana House of Representatives Judiciary Committee, at 8.

²⁰ *Id.*